LIBRARY
SUPREME COURT, U. S.

FILED
OCT 12 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 75

FRANK LEE, as Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, as Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, as Warden of the City Jail of Birmingham, Alabama,

Appellants,

—v.—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

BRIEF FOR APPELLEES

CHARLES MORGAN, JR.
5 Forsyth Street, NW
Atlanta, Georgia 30303

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue North
Birmingham, Alabama

LAUGHLIN McDONALD
5 Forsyth Street, NW
Atlanta, Georgia 30303

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010

Attorneys for Appellees

INDEX

PAGE

Statement of the Case 1

ARGUMENT.

1. Alabama Statutes Which Require the Segregation, Classification and Destination According to Race of Prisoners in State Penal Institutions and County and City Jails Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States 6

2. Appellees Have Standing to Challenge Statutes and Practices Requiring Segregation, Classification and Designation by Race of Prisoners in the Penal Facilities in the City of Birmingham 16

3. The District Court Can Require Appellant Commissioner of Corrections of Alabama to Supervise the Desegregation of All State Penal Facilities Where the Board of Corrections for the State of Alabama, and Particularly the Commissioner Thereof, Has the Duty to Inspect and Generally Supervise Every County and Municipal Jail or Prison in Any Incorporated Town and City in the State of Alabama Having 10,000 or More Population, and the Court May Require Appellant Lee to Make Reports Every Three Months as to the Steps Taken and Progress Made in Eliminating Racial Segregation in the State Penal Institutions and in the County and City Jails in the State of Alabama 19

PAGE

4. Appellant Austin May Stand as a Representative Defendant of Other Wardens and City Jailers in the State of Alabama Within the Meaning of Rule 23, Federal Rules of Civil Procedure, So That Appellees Can Maintain This Action Through Him as Representative of the Class of Wardens and Jailers of City and Town Jails in Alabama 21

5. The Order Appealed From Does Not Interfere With the Exercise of Lawful Discretion on the Part of State Prison Officials 23

CONCLUSION 24

TABLE OF AUTHORITIES

Cases:

Anderson v. City of Albany, 321 F. 2d 649 (5th Cir. 1963) 17
Augustus v. Board of Public Instruction, 306 F. 2d 862 (5th Cir. 1962) 20

Bailey v. Patterson, 369 U. S. 31 (1962) 17
Baker v. Carr, 369 U. S. 186 (1962) 23
Bradley v. School Board of the City of Richmond, Virginia, 317 F. 2d 429 (4th Cir. 1963) 18
Brown v. Board of Education, 347 U. S. 483 (1954) 6
Buchanan v. Worley, 245 U. S. 60 (1917) 15
Buckner v. County School Board of Greene County, Virginia, 332 F. 2d 452 (4th Cir. 1964) 18
Bush v. Orleans Parish School Board, 188 F. Supp. 916 (N. D. La. 1960) 16

PAGE

Bush v. Orleans Parish School Board, 308 F. 2d 491 (5th Cir. 1962), on rehearing 308 F. 2d 503 (5th Cir. 1962) 20

Cochrán v. Kansas, 316 U. S. 255 (1942) 7
Cooper v. Aaron, 358 U. S. 1 (1958) 15, 16
Cooper v. Pate, 378 U. S. 546 (1964) 7

Dorsey v. Fortson, 228 F. Supp. 259 (N. D. Ga. 1964) 23

Edwards v. Sard, 250 F. Supp. 977 (D. C. 1966) 6, 14, 15
Evers v. Dwyer, 358 U. S. 202 (1958) 17
Ex parte Cleio Hull, 312 U. S. 546 (1941) 7

Ferguson v. Buchanan, No. 64-107-CIV—CF, So. Dist. Fla., March 12, 1965 18
Fulwood v. Clemmer, 295 F. 2d 171 (D. C. Cir. 1961) 7

Griffin v. Prince Edward School Board, 377 U. S. 218 (1964) 16

Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909 (9th Cir. 1964) 22
Hunt v. Arnold, 172 F. Supp. 847 (N. D. Ga. 1959) 16

James v. Duckworth, 170 F. Supp. 342 (E. D. Va. 1959). 16
Johnson v. Dye, Warden, 175 F. 2d 250 (3rd Cir. 1949) 7

Kemp v. Beasley, 352 F. 2d 14 (8th Cir. 1965) 19-21

Monroe v. Pape, 365 U. S. 167 (1961) 7

Pierce v. LaVallee, 293 F. 2d 233 (2nd Cir. 1961) 7
Potts v. Flax, 313 F. 2d 284 (5th Cir. 1963) 19, 22

PAGE

Price v. Johnston, 334 U. S. 266 (1948) 7
Public Affairs Associates v. Rickover, 369 U. S. 111 (1962) 17

Reynolds v. Sims, 377 U. S. 533 (1964) 20, 23
Ross v. Dyer, 312 F. 2d 191 (5th Cir. 1962) 20

Sewell v. Pegelow, 291 F. 2d 196 (4th Cir. 1961) 7
Sims v. Frink, 208 F. Supp. 431 (M. D. Ala. 1962) 22, 23
Singleton v. Board of Commissioners, 356 F. 2d 771 (5th Cir. 1966) 6, 17
Smith v. Board of Education of Morrilton School Dist. No. 32, 365 F. 2d 770 (8th Cir. 1966) 20

Talley v. Stephens, 247 F. Supp. 683 (E. D. Ark. 1965) 7
Toombs v. Fortson, 205 F. Supp. 248 (N. D. Ga. 1962) 23

United States v. Jefferson County Board of Education, 372 F. 2d 836 (5th Cir. 1966) 19

Walker v. Pate, 356 F. 2d 502 (7th Cir. 1966) 7
Washington v. Lee, 263 F. Supp. 327 (M. D. Ala. 1967) 6, 7, 17
White v. Ragen, 324 U. S. 760 (1945) 7

United States Constitution:

Fourteenth Amendment 6, 7, 8

Statutes and Rule:

Federal Rules of Civil Procedure, Rule 23 21

Title 45, Code of Alabama, Recompiled 1958, §§3, 7, 10(1), 10(5), 10(8), 11 20

PAGE

Other Authorities:

Alexander, "Corrections in Transition," 45 Nebraska L. Rev. 10 ..... 8, 10

Cloward, "Social Control and the Prison," *Theoretical Studies and Social Organization of the Prison*, Social Science Research Council, New York, 1960 9

Dressler, "Practice and Theory of Probation and Parole," Columbia U. Press, New York, 1959 10

Glasser, "The Effectiveness of a Prison System and Parole System," Bobbs-Merrill, New York, 1964 10

Mandelbaum, "Soldier Groups and Negro Soldiers," U. of California Press, Berkeley, 1952 ..... 12, 15

Merton, "Social Theory and Social Structure," The Free Press, Glencoe, Ill., 1949 12

Nichols, "Notes Made on Breakthrough on the Color Front," Random House, New York, 1954 ..... 12, 13, 14

Readings in Criminology and Penology, Columbia U. Press, New York, 1964 10

Task Force Report: Corrections, the President's Commission on Law Enforcement and the Administration of Justice, U. S. G. P. O., Washington, D. C. (1967) 8

Wainwright, "A New Concept in Florida's Prison," 39 Florida B. J. 161 (March, 1965) 9

3 Moore, Federal Practice (2d Ed., 1963) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 75

FRANK LEE, as Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX MCLAUGHLIN and WILLIAM MITCH, as Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, as Warden of the City Jail of Birmingham, Alabama,

Appellants,

—v.—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL MCCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

BRIEF FOR APPELLEES

Statement of the Case

The Alabama Prison System consists of two prisons for men (Atmore and Kilby Prisons), one honor camp (No. Four Honor Camp), a correctional center (Draper Correctional Center), a youth center (Frank Lee Youth Cen-

ter), a cattle ranch (State Cattle Ranch), a trusty barracks (Trusty Barracks), a prison for women (Julia Tutwiler Prison for Women), and approximately 25 highway road camps (R. 27, 35, 160). All of the above institutions are maintained for racially exclusive prisoner populations with the exception of Atmore and Kilby Prisons, Trusty Barracks, No. Four Honor Camp, Draper Correctional Center, and Julia Tutwiler Prison for Women where it was found to be "impracticable to assign only one race" (R. 28, 36). In those facilities where members of both races are assigned, with the exception of the tubercular ward at Kilby Prison Hospital, white and Negro convicts of the same sex are not allowed to sleep together, eat together, attend religious services together or use at the same time the general facilities of the institution (R. 28, 36, 161, 176-177). Negroes are, however, allowed to participate in athletic and other recreational activities with members of the white race (R. 28, 36). Racial segregation of prisoners in the Alabama Prison System pursuant to state statutes is enforced by the Board of Corrections (R. 28-31, 36-37). Appellant Lee stated that the desegregation of prisons and penal institutions under his supervision might take a month or ". . . it might take a year; . . . we would make every effort to make it—make it function, but I would hate to think that we—we would have to do it in less than a year's time, even though if we were to get such order why, we would start possibly tomorrow" (R. 166, 167). Appellant Lee testified that formerly he had been a sheriff of Greene County, Alabama, that his duties as sheriff were substantially similar to the duties of every other sheriff in the State of Alabama (R. 171), and that within certain limitations based upon prison population and finances available, the duties of wardens of city and town jails are

substantially similar throughout the State of Alabama (R. 171-172). Appellant Lee further testified that there is a vocational rehabilitation program at Draper Correctional Center and that in his opinion the rate of recidivism for groups finishing the rehabilitation programs would be considerably less than for those which do not (R. 172-173). Appellant Lee stated that he expected no trouble from the desegregation of the State Cattle Ranch and that he would expect trouble in the maximum security areas of the State Penal System (R. 174-175). At the Kilby Prison Hospital there are three wings, one for white, one for colored, and one for tubercular patients, Negroes and whites being kept on an integrated basis in the latter (R. 176-177). The state's total prison population is 1,589 white and 3,427 Negroes (R. 177, 199-200). Appellant Lee stated that his department could make reports to the court concerning the desegregation of county and city jails and that "this is some of the planning that we have been doing, in anticipation of something like this" (R. 183).

A. Melvin Bailey, Sheriff of Jefferson County, Alabama (a defendant below), stated that all of the Jefferson County Prisons are maintained on a racially segregated basis (R. 65-67, 185), and that Negroes and whites never use the same facilities at the same time (R. 186). Religious services, however, are integrated (R. 187).

Visiting hours are separated on the basis of race (R. 189). A. Melvin Bailey testified that in his experience there had never been an occasion when it was necessary to classify prisoners solely because of race in order to maintain and operate any prison subject to his control and authority in a proper fashion (R. 189).

Prisoners are segregated on the basis of race in the City Jail of Birmingham pursuant to state law (R. 96-97). Monthly reports are furnished the Chief of Police of the City of Birmingham concerning the race, sex and age of prisoners confined in the Birmingham City Jail (R. 97).

Appellant Robert K. Austin (defendant below), testified that the average stay of a prisoner in the Birmingham City Jail was 7 to 15 days but that " . . . some get in and stay only a couple of hours" (R. 192-193). Appellant Austin further testified that his whole experience showed that integration created no problems with respect to trusties, work gangs, farm crews and maintenance crews (R. 195), and that his chief concern about integregation was the use of the drunk tanks and that he didn't foresee much problem except as to that particular facility (R. 196).

Appellees introduced into the record testimony of John O. Boone, an employee of the Southern Regional Council, a human relations agency with headquarters in Atlanta, Georgia (R. 145). Mr. Boone holds an A.B. degree from Morehouse College and a Master of Social Work degree from Atlanta University (R. 146). Mr. Boone is a former employee of the Federal Prison System, having been employed for approximately 14 years at the Atlanta Federal Penitentiary (R. 146). For a period of time he was Chief of the Classification and Parole Unit at the United States Penitentiary, Terre Haute, Indiana (R. 146). His present position with the Southern Regional Council involves his administering a three year Ford Foundation grant designed to support improvement of procedures to cope with delinquency and crime and to improve procedures of penal administration in the Southern region (R. 145-146).

Mr. Boone testified that based upon his experience no substantial problems would be met in any penal institution in the State of Alabama as a result of racial desegregation if such desegregation were properly managed (R. 147). Mr. Boone also stated that the process of desegregation in the Atlanta Penitentiary was begun in 1951 and concluded in 1965 but that he was not trying to imply that the desegregation process took that long to be implemented (R. 149). Mr. Boone stated that whether or not desegregation would work in a given prison was related to the management, whether or not they were determined, whether or not the atmosphere was right, and whether or not the policy of the institution was equal treatment without regard to race (R. 150). According to the witness the type of prisoners usually found in federal penal institutions is no different from those usually found in state institutions (R. 153). Mr. Boone testified that in an integrated prison situation tension would go down if the integration process were properly handled, and that racial incidents would be reduced (R. 157).

Defendant A. Melvin Bailey, sued as Sheriff of Jefferson County, Alabama, and as representative of the State's other sheriffs, filed no appeal.

ARGUMENT

1. ALABAMA STATUTES WHICH REQUIRE THE SEGREGATION, CLASSIFICATION AND DESIGNATION ACCORDING TO RACE OF PRISONERS IN STATE PENAL INSTITUTIONS AND COUNTY AND CITY JAILS VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

As the court below said, the law is ". . . unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated." *Washington* v. *Lee*, 263 F. Supp. 327, 331 (M. D. Ala. 1967), citing *Brown* v. *Board of Education*, 347 U. S. 483 (1954). The *Brown* rationale was similarly applied in *Singleton* v. *Board of Commissioners*, 356 F. 2d 771 (5th Cir. 1966), to rule unconstitutional the practice of racial segregation in penal and correctional facilities in the State of Florida. In *Singleton*, the court noted:

> Twelve years ago, in *Brown* v. *Board of Education of Topeka*, 1954, 347 U. S. 483, the Supreme Court effectively foreclosed the question of whether a State may maintain racially segregated schools. The principle extends to all institutions controlled or operated by the state. "[I]t is no longer open to question that a state may not constitutionally require segregation of public facilities. *Johnson* v. *Virginia*, 1963, 373 U. S. 61, 62." 356 F. 2d at 772.[1]

---

[1] See also *Edwards* v. *Sard*, 250 F. Supp. 977, 982 (D. C. 1966) where the court denied relief but only because plaintiffs " . . . failed to show that a policy of racial segregation . . . motivated dormitory assignments."

Confinement in a prison ". . . brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system . . ." *Price* v. *Johnston*, 334 U. S. 266, 285 (1948). However, it is a principle well established that prisoners ". . . do not lose all of their civil rights, and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into the prison and protect them there from unconstitutional administrative action on the part of prison authorities carried out under color of state law, custom or usage." *Talley* v. *Stephens*, 247 F. Supp. 683, 686 (E. D. Ark. 1965). *Cochran* v. *Kansas*, 316 U. S. 255 (1942); *Cooper* v. *Pate*, 378 U. S. 546 (1964); *Sewell* v. *Pegelow*, 291 F. 2d 196 (4th Cir. 1961); *Pierce* v. *LaVallee*, 293 F. 2d 233 (2nd Cir. 1961); *Fulwood* v. *Clemmer*, 295 F. 2d 171 (D. C. Cir. 1961); *Ex Parte Cleio Hull*, 312 U. S. 546 (1941); *Johnson* v. *Dye, Warden*, 175 F. 2d 250 (3rd Cir. 1949); *White* v. *Ragen*, 324 U. S. 760 (1945); *Monroe* v. *Pape*, 365 U. S. 167 (1961). Appellants contend that the instant case involves routine prison discipline with which the courts should not interfere. *Walker* v. *Pate*, 356 F. 2d 502 (7th Cir. 1966). Appellees submit, however, that this case involves not prison discipline or the exercise of lawful discretion by prison officials. Rather the case involves segregation by race as a matter of state law. In matters of racial segregation prison officials have no "authority" whatsoever. Alabama's statutes themselves eliminate all discretion. The court below correctly found ". . . no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities." 263 F. Supp. at 331.

Appellants contend that prisons are not operated for the "benefit" of inmates (Appellants' Brief, p. 16) but are maintained solely to punish, to deter, and separate (Appellants' Brief, pp. 14-15). Without citing any authority for the proposition, appellants conclude that the above functions of penal institutions relieve them of the duty of complying with the Fourteenth Amendment of the Constitution of the United States.

The whole weight of modern penological theory and practice mitigates against the acceptance of any exclusively punitive philosophy. According to Myrl Alexander, Director of the United States Bureau of Prisons, "the argument for retribution has been weakened by increasing evidence that criminal behavior is neither the exclusive nor direct result of the exercise of 'free will' . . . The avowed purpose of deterrence at least recognizes protection of society as the aim of punishment. But, if punishment or the fear of it, deters as its proponents claim, it follows that the more severe the punishment the more effective the deterrence. It has been amply demonstrated that this is not so."[2] The Correctional Task Force of the President's Commission on Law Enforcement and the Administration of Justice observed that "The extent to which, and the situations in which, various sorts of punishment act as deterrents is wholly unestablished by objective research or study."[3]

Louie L. Wainwright, Director of the Federal Department of Corrections, has similarly questioned the validity

---

[2] Myrl E. Alexander, "Corrections in Transition," Nebraska Law Review, 45:10, p. 14.

[3] Task Force Report: Corrections, the President's Commission on Law Enforcement and the Administration of Justice, U. S. G. P. O., Washington, D. C. (1967), p. 2.

of the deterrence theory. "Another prevalent belief was that having once been confined an inmate's fear of again being imprisoned would be enough to keep him from returning to a life of crime. Statistics have proven that this 'fear' does not keep many from returning to prison a second, third or fourth time." [4] Wainwright further observes that "it [has] been a common belief in this country that the greatest good to come from a period of imprisonment was the fact that while the offender was isolated from society he could not commit any additional crimes. This may be true, but the fallacy of this reasoning is that 93% of all persons confined to a penal institution do eventually return to society and, unfortunately, many of these do commit subsequent crimes . . ." [5]

Thus the trend of modern penology is to operate institutions in such a way that changes will be effected in the behavior of the inmate to the end that he will be prepared to assume a socially acceptable role upon release. As early as 1870 this view was explicitly taken by the American Prison Association, which in the declaration of principles adopted at the National Conference on Penitentiary and Reformatory Discipline at Cincinnati, stated "the treatment of criminals by society is for the protection of society. But since such treatment is directed to the criminal rather than to the crime, its great objective should be his moral regeneration. Hence the supreme aim of prison administration is the reformation of criminals, not the infliction of vindictive suffering." [6]

---

[4] Louie L. Wainwright, "A New Concept in Florida's Prison," Florida B. J. 39:161, March, 1965.

[5] *Ibid.*

[6] Cited by Richard Cloward, "Social Control and the Prison," *Theoretical Studies and Social Organization of the Prison,* Social Science Research Council, New York, 1960, p. 29.

Mr. Alexander has stated the case for an interrelation between protection of society and the rehabilitation of the offender. "The ideal of rehabilitation has been advanced as the most effective way to protect society against later relapses into crime and is based on belief in the worth and dignity of every human being and a willingness to expend efforts to reclaim him. The objective is to change the offender's attitudes, help him cope with the realities of his existence, acquire an understanding of his problems and needs, redirect his goals, redevelop his sense of values and achieve a greater measure of self discipline . . ." [7]

The prison reform movement began in the United States in the mid-nineteenth century. The movement broke with the older theories of criminology which emphasized severe discipline and isolation calculated to make men penitent. ". . . [T]he new movement fostered efforts to achieve more positive changes in the offenders by education and by vocational training." [8] The new penologists felt that prisons and correctional institutions should be more than merely places where men were incarcerated and punished. Rather, they should be places where inmates are educated and if possible reformed so that upon their release they could take their places in society as useful citizens. See generally: Dressler, David; *Practice and Theory of Probation and Parole,* 1959, Columbia University Press, New York, and *Readings in Criminology and Penology,* Columbia University Press, New York and London, 1964.

Racial segregation in prisons flies in the face of the basic principles of modern penology. If inmates in Alabama are

---

[7] Alexander, *loc. cit.*

[8] Glasser, Daniel: *The Effectiveness of a Prison System and Parole System,* the Bobbs-Merrill Co., Inc., 1964, p. 260.

being "educated" it is an education in reverse. For instead of learning to respect the law and the rule of law that governs the world beyond bars, racially segregated prisoners, Negroes and whites, relearn contempt for the law. If the Alabama prison system is to fulfill its obligation to the citizens of that state and this nation to whom it daily sends released inmates, it must make an effort to prepare them for a life in a world in which they respect the law. And that law is color-blind.

Appellants resist desegregation, arguing the fear that desegregation will cause race riots or other forms of racial conflict. This Court has rejected the kind of logic which would permit appellants to maintain racially segregated state facilities which are in fact the historic cause of racial tension and disturbance. Appellants seem to desire to reap the benefits of the racial tension and strife which Alabama causes and perpetuates by its present practices. The old arguments of racial violence, or some subtle variant of them, have been made by segregationists since race became a public issue in this country. Before the public schools were integrated, they argued that neither race really wanted integration, and that in any case, there was no issue of public morality, only public safety. Many schools have since desegregated, and despite the determination of some state officials to make the process as painful as possible, there has been little actual violence—and certainly not on the scale predicted by segregation's prophets. The real problem had been the fear and distrust that the old custom of segregation had created and perpetuated. Violence is not the child of integration: it is the child of distrust and fear. For segregation undermines the confidence

of both races. The institution itself serves to prove itself. Thus, the viciously circular prophecy fulfills itself.[9]

Indeed, "the self-aggravating and self-defeating cycle of segregation . . . does not accomplish the expedient, short range goals of decreasing racial friction which it is supposed to achieve. Instead it frequently tends to increase such friction. And it is self-aggravating because officials frequently respond to the troubles intensified by segregation by increasing the restrictions of segregation."[10] Just such a technique is being utilized by the appellants. It is nothing more than a variant of the segregationists' old dogma.

It is interesting to note that when the Army began to desegregate its ranks in 1950, there were, according to Lee Nichols, a career newsman and journalist, " . . . general predictions of ruined efficiency, wrecked morale, even bloody revolt . . . (*Notes Made on Breakthrough on the Color Front,* Random House, New York, 1954, p. 7). There were objections from the enlisted men, who predicted all kinds of trouble and some of the big guys [i.e. Department of the Army officials] jumped all over it." (*Ibid.,* pp. 58-59.) And indeed, there *had* been trouble—serious racial disturbances, and even full-scale race riots. What then was the experience of the Army once the desegregation process had actually begun? According to Nichols:

> Detailed official analysis by statements of hundreds of field commanders, showed that racial conflict—once

---

[9] Merton, Robert K., *Social Theory and Social Structure,* The Free Press, Glencoe, Illinois, 1949, p. 185.

[10] Mandelbaum, David G.: *Soldier Groups and Negro Soldiers,* 1952, University of California Press, Berkeley and Los Angeles, pp. 89-90.

> a critical military problem that led to repeated bloody riots, had all but vanished. With Negroes and whites no longer grouped separately, there was apparently little motive for racial "gang" conflict.[11] (*Ibid.*, p. 7.)

A typical example is that of Fort Jackson. Fort Jackson is located in the heart of the Piney Woods section of South Carolina, deep in the deep South. In 1950 not even the trains and Greyhound buses that pulled into nearby Columbia from New York or California were integrated. Somewhere along the route, Negroes were just sort of sifted to the back. To use a popular phrase of the time, this was the land of "sow belly and segregation." The name fit and the folks, white folks, liked it that way.

In the spring of 1950, Fort Jackson was integrated. There were no interracial incidents. The Fort had been recently reactivated as a major infantry training base. It was under the command of Brigadier General Frank McConnell. The first draftees arrived in August of that year and according to McConnell, he "tried to sort them by color, but they began pouring in more rapidly; we got up to 1,000 recruits a day." (*Ibid.*, p. 109.) As the re-

---

[11] Other branches of the armed forces reported similar experiences. According to official Navy records, reports show that Negro personnel were being integrated successfully in previously all-white ships' companies. "The skippers were polled and all but one reported favorably according to an official observer." *Ibid.*, p. 60. As far as the Air Force was concerned, "the experiment [of integration] was succeeding beyond the most optimistic hopes. A typical center in San Antonio, Texas, had been training airmen without racial distinction for more than two months with 'no racial disturbances in any phase . . . on or off duty.'" *Ibid.*, p. 101. In fact, in both the Army and Navy "racial experts in the Pentagon noted with satisfaction the result they had come to expect in steps to end segregation—no untoward incidents or trouble of any kind." *Ibid.*, p. 216.

cruits arrived without any pattern—a busload of Negroes and then a busload of whites, McConnell found it impossible to sort them out on the basis of race. He had a very limited staff, and in spite of the fears expressed by some of his subordinates that he was going "off the deep end," he resolved to assign recruits to platoons without regard to race.

The new plan worked. There were no racial incidents during McConnell's entire tour of duty at Fort Jackson. According to McConnell, "the attitude of the Southern soldier was that this was the Army way; they accepted it the same way they accepted getting booted out of bed at 5:30 in the morning." (*Ibid.*, p. 111.)

It is another of life's ironies that the armed forces historically justifying its policy of segregation on the grounds of maintaining discipline, efficiency and morale now justify the policy of complete integration on the grounds of maintaining efficiency, discipline and morale.

In *Edwards* v. *Sard, supra,* the court said at page 977 that " . . . the association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings." The combat armed forces is an exception to this rule. Few would deny that physical danger and psychological pressures are at least as great in war as in correctional institutions. And it was just such a fact that the advocates of segregation in the armed forces pointed to as justification for maintaining racial segregation. Yet the armed forces did integrate, and while integration did not reduce the physical risks of war, it did reduce the psychological pressures that the armed forces personnel were under. Specifically it

made better soldiers of Negroes and whites alike, for it helped build mutual confidence and respect between fighting men of both races where before there had been only suspicion and distrust. The real source of racial tension and trouble in the previously segregated armed forces was the single fact of segregation, racial segregation itself.[12]

If ever there is to be improvement or a breaking of the self-aggravating and self-defeating cycle of segregation, state laws requiring racial segregation must be struck down. Such a course alone will insure the orderly administration of Alabama prisons and city and county jails. *Edwards* v. *Sard, supra,* 979 (" . . . Full racial integration is invariably a desirable goal . . . ").

Furthermore it is well settled that the threat of racial violence cannot justify the denial of constitutional rights. *Cooper* v. *Aaron,* 358 U. S. 1 (1958). This proposition is all the more applicable where, as here, prison officials themselves are the key to the orderly desegregation process. Just as constitutional rights " . . . are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature," *Cooper* v. *Aaron, supra,* p. 16, so the constitutional rights of appellees should not be sacrificed because Alabama officials do not care to insure that the process of prison desegregation will be orderly. As the court noted in *Buchanan* v. *Worley,* 245 U. S. 60, 81 (1917), quoted with approval in *Cooper* v. *Aaron, supra,* p. 16: "It is urged that this proposed segregation will promote the public peace by preventing race conflict. Desirable as this is, and important as is the public peace, this aim cannot be accomplished by

---

[12] Mandelbaum, David G., *op. cit.*, pp. 89, 90.

laws or ordinances which deny rights created or protected by the Federal Constitution." [18]

Schools differ from prisons. However the *Cooper* v. *Aaron* line of cases is apposite. Prisons do have a correctional function. One of their most important functions is the education or, perhaps more aptly stated, the re-education of inmates. For this reason Alabama's penal institutions do have educational programs. The constitutional right to be free from a governmentally imposed policy of racial discrimination is clear.

2. APPELLEES HAVE STANDING TO CHALLENGE STATUTES AND PRACTICES REQUIRING SEGREGATION, CLASSIFICATION AND DESIGNATION BY RACE OF PRISONERS IN THE PENAL FACILITIES IN THE CITY OF BIRMINGHAM.

At the time of the filing of the complaint on February 18, 1966, appellees Williams and Houck were incarcerated in the City Jail of Birmingham, Alabama. Subsequently, the charges against Houck were *nolle prossed* and appellee Williams entered a plea of guilty to charges against him and paid the fine imposed upon said plea (R. 201-209). Appellants now assert that due to the fact that appellees Williams and Houck are no longer incarcerated they have no standing to challenge the statutes or practices relating

---

[18] See also *Hunt* v. *Arnold*, 172 F. Supp. 847 (N. D. Ga. 1959); *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 930 (N. D. La. 1960) (where the district court noted that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights."); *Griffin* v. *Prince Edward School Board*, 377 U. S. 218, 231 (1964) ("Grounds of race and opposition to desegregation do not qualify as constitutional"), and *James* v. *Duckworth*, 170 F. Supp. 342, 350-351 (E. D. Va. 1959) ("The preservation of the public peace cannot operate in such a manner as to cause constitutional rights to be sacrificed or yielded.").

to segregation by race of the penal facilities of the City of Birmingham. The general principle of standing in such situations was enunciated in *Singleton* v. *Board of Commissioners, supra,* 773: "The general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use." It is not contested in the instant case that appellees enjoyed a "past use" of penal facilities of the City of Birmingham. As to the problem of future use the lower court correctly stated the law to be that it was not " . . . necessary that plaintiffs show an intention to violate the laws of the state of Alabama or the City of Birmingham in such a manner that would subject one or more of them in the future to imprisonment in these locations. *Mitchell* v. *United States,* 313 U. S. 80. Under the circumstances reflected by the evidence in this case, all that is necessary for the plaintiffs to show on this particular point, in order to challenge the statutes and practices concerning segregation of the races in the penal facilities in the Birmingham City Jail . . . is that the operation of th[is] institution . . . , as that operation presently exists, 'permit[s] the recurrence of comparable violations.' *Henderson* v. *U. S.,* 339 U. S. 816." 263 F. Supp. 329-330.[14]

The court below further noted that the rule against relying on the constitutional rights of others—those presently imprisoned in the City Jail of Birmingham—is not part of the constitutional requirement of standing but is rather a rule of judicial restraint which should not be applied where

[14] Also see: *Evers* v. *Dwyer,* 358 U. S. 202, 204 (1958); *Public Affairs Associates* v. *Rickover,* 369 U. S. 111, 116 (1962); *Anderson* v. *City of Albany,* 321 F. 2d 649 (5th Cir. 1963), and *Bailey* v. *Patterson,* 369 U. S. 31 (1962).

it would be difficult, if not impossible, for the persons whose rights are asserted to present their grievance to a court of proper jurisdiction. For in the instant case, as appellant Austin testified, prisoners are incarcerated in the Birmingham City Jail on an average of from seven to fifteen days and under such circumstances it would be difficult if not impossible for a prisoner to secure a hearing on his case prior to his release. *Ferguson* v. *Buchanan*, No. 64-107-CIV—CF, So. Dist. Fla., March 12, 1965. Aswell, the mere *nolle prossing* or other disposition of charges against appellees pending in the City of Birmingham at the time the suit hereof was filed cannot lawfully defeat the jurisdiction of the court once it attaches. In *Buckner* v. *County School Board of Greene County, Virginia*, 332 F. 2d 452 (4th Cir. 1964), a class action, the court held that even though all of the named plaintiffs had been subsequently placed in schools chosen by their parents or legal guardians and thus were entitled to no relief, the lower court still must consider their request for injunctive relief. The court reasoned that the case was not moot, nor jurisdiction over the defendants lost, for "the right of the plaintiffs to obtain injunctive relief for the class they represent as well as individual relief for themselves is clear beyond doubt." *Buckner* v. *County School Board of Greene County, Virginia, supra*, p. 454. The court went on to approve its language in *Bradley* v. *School Board of the City of Richmond, Virginia*, 317 F. 2d 429 (4th Cir. 1963): "[N]ot only are the individual infant plaintiffs entitled to relief which has been ordered but the plaintiffs are entitled, on behalf of others of the class they represent and who are similarly situated, to an injunction against the continuation of the discriminatory system and practices which have been found to exist," 332 F. 2d at 455.

Thus the court, having acquired jurisdiction over the parties and issues retains such jurisdiction so long as the complained of practices and statutes continue to exist. The fact that the named plaintiffs have been granted relief seems immaterial.

3. THE DISTRICT COURT CAN REQUIRE APPELLANT COMMISSIONER OF CORRECTIONS OF ALABAMA TO SUPERVISE THE DESEGREGATION OF ALL STATE PENAL FACILITIES WHERE THE BOARD OF CORRECTIONS FOR THE STATE OF ALABAMA, AND PARTICULARLY THE COMMISSIONER THEREOF, HAS THE DUTY TO INSPECT AND GENERALLY SUPERVISE EVERY COUNTY AND MUNICIPAL JAIL OR PRISON IN ANY INCORPORATED TOWN AND CITY IN THE STATE OF ALABAMA HAVING 10,000 OR MORE POPULATION, AND THE COURT MAY REQUIRE APPELLANT LEE TO MAKE REPORTS EVERY THREE MONTHS AS TO THE STEPS TAKEN AND PROGRESS MADE IN ELIMINATING RACIAL SEGREGATION IN THE STATE PENAL INSTITUTIONS AND IN THE COUNTY AND CITY JAILS IN THE STATE OF ALABAMA.

The District Court's decree requiring Appellant Lee to supervise the desegregation of all penal institutions in the State of Alabama and to make periodic reports to the court was a proper exercise of judicial discretion. The courts often require parties similarly situated to submit desegregation plans. See *Potts* v. *Flax*, 313 F. 2d 284 (5th Cir. 1963). None was required here. Furthermore, the courts have recently approved the application of the Department of Health, Education, and Welfare Guidelines to school desegregation plans, a more extreme application of judicial supervision than is present in the instant case. *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1966); *Kemp* v. *Beasley*, 352 F. 2d 14, 18-19

(8th Cir. 1965), and *Smith* v. *Board of Education of Morrilton Sch. Dist. No. 32,* 365 F. 2d 770 (8th Cir. 1966). It is clear that the courts may require appellants to take affirmative steps to insure the desegregation of public facilities in public institutions. *Bush* v. *Orleans Parish School Board,* 308 F. 2d 491 (5th Cir. 1962), on rehearing 308 F. 2d 503 (5th Cir. 1962); *Augustus* v. *Board of Public Instruction,* 306 F. 2d 862, 869 (5th Cir. 1962) (where the court required defendant Board to submit an amended and more adequate desegregation plan including additional specific measures which were then listed by the court), and *Ross* v. *Dyer,* 312 F. 2d 191 (5th Cir. 1962) (where the court entered its own desegregation order).

The court will, when necessary, enter a decree specifying the manner of implementation of its decision. See *Reynolds* v. *Sims,* 377 U. S. 533, 586-587 (1964) where the court noted that the ordering into effect by the District Court of a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was in the view of the Supreme Court " . . . an appropriate and well-considered exercise of judicial power."

Pursuant to §§3, 7, 10 (1), 10 (5), 10 (8) and 11 of Title 45, Code of Alabama, Recompiled 1958, the Board of Corrections for the State of Alabama and particularly the Commissioner thereof has the duty and function of inspecting and supervising every county and municipal jail or prison in any incorporated town and city in the State of Alabama having a population of more than 10,000. Appellant Lee further testified that such authority extended to all county jails and that only city jails in towns of less

than 10,000 were omitted from his general supervisory authority. Appellants contend that with respect to city jails in towns of less than 10,000 population appellant Lee has no supervisory power. However, both logic and the orderly administration of justice require that appellant Lee be required to discharge the supervisory and reporting functions vested in him by the court. Appellant Lee is the highest ranking prison authority in the State of Alabama. He must supervise and report on desegregation progress in almost all (and certainly the major) state, city, county and town penal facilities. He can do so regarding smaller facilities expeditiously and economically. Like means employed for reporting to him and to the court may be employed by using the same forms and techniques otherwise employed by him for those facilities under his direct control. And, in the event that Commissioner Lee could not exact compliance with the court's order in one of the few jails located in towns of less than 10,000 people, he need merely report that fact to the court. Since the custodians of those facilities are members of appellant's class, the court could directly deal with recalcitrant officials.

4. APPELLANT AUSTIN MAY STAND AS A REPRESENTATIVE DEFENDANT OF OTHER WARDENS AND CITY JAILERS IN THE STATE OF ALABAMA WITHIN THE MEANING OF RULE 23, FEDERAL RULES OF CIVIL PROCEDURE, SO THAT APPELLEES CAN MAINTAIN THIS ACTION THROUGH HIM AS REPRESENTATIVE OF THE CLASS OF WARDENS AND JAILERS OF CITY AND TOWN JAILS IN ALABAMA.

The court below expressed serious misgivings as to the standing of appellant Austin to raise the question of his ability to represent the class of wardens and jailers of city and town jails in the State of Alabama. The court reasoned

that if such a defense were available it would be available only to the other members in the class asserting inadequate representation and that as to the named appellants, jurisdiction in any event would be proper. However, the court ruled properly that such a defense would not be available to *any* members of the class, thus avoiding the question of whether or not such a defense could properly be raised, if available, by any of the named appellants. The rule of class representation requires only that there be questions of law and fact common to the named defendants and members of the class which they represent. Such a requirement was satisfied in the instant case. It is immaterial whether or not the members of the class are in every respect identically situated. 3 Moore, *Federal Practice,* paragraph 23.10 at 3454 (2d Ed., 1963). All the wardens and jailers in the State of Alabama are affected equally and in a similar manner by the statutory provisions complained of. Each such warden and jailer has identical interests with respect to the statutes requiring racial segregation in Alabama prisons and jails. The fact that the physical facilities of the Birmingham City Jail may be more elaborate and its operation somewhat different from those of other jails in Alabama cannot, standing alone, serve to nullify the operation of that portion of the class action rule that authorizes representative defendants. *Harris* v. *Palm Springs Alpine Estates, Inc.,* 329 F. 2d 909, n. 7 at p. 914 (citing cases) (9th Cir. 1964). See also *Potts* v. *Flax, supra,* and *Sims* v. *Frink,* 208 F. Supp. 431 (M. D. Ala. 1962). It would in fact be literally impossible to find any member of a given class who could stand as a representative were not some significant differences in the actual facilities and operations involved allowable. The law

does not require such impossible preconditions for the maintenance of a class action.[15]

5. THE ORDER APPEALED FROM DOES NOT INTERFERE WITH THE EXERCISE OF LAWFUL DISCRETION ON THE PART OF STATE PRISON OFFICIALS.

The lower court did not require appellants to submit a plan of desegregation nor did it require that all penal facilities in the State of Alabama be desegregated immediately. Indeed, under state law no discretion existed in state officials regarding desegregation. Their discretion related to where, not whom, they would segregate. And the District Court allowed them literally every concession they requested as necessary to effectuate the desegregation of facilities within their respective institutions. Appellant Lee, for example, stated that some of his facilities could be desegregated immediately while others would take approximately one year (R. 166-167). The court's decree reflects appellants' judgment in this regard. In effect, appellant Lee wrote his own desegregation order. As to defendant Bailey, no appeal was taken and thus no disagreement with the court's plan of desegregation as to facilities within his jurisdiction can be raised. As to appellant Austin, it was stated that his concern about desegregation involved the use of the drunk tank and that he did not foresee "much

---

[15] See *Sims* v. *Frink, supra, affd. sub nom. Reynolds* v. *Sims,* 377 U. S. 533 (1964) where three Judges of Probate of the State of Alabama were allowed to represent the class of all Judges of Probate in Alabama, notwithstanding that there were population disparities as regards their jurisdiction and administrative dissimilarities equally as great as those asserted here by appellants. See also: *Toombs* v. *Fortson,* 205 F. Supp. 248 (N. D. Ga. 1962) where six ordinaries (county officers whose duty it is to supervise primary and general elections) of selected counties in Georgia represented for purposes of a reapportionment suit all ordinaries in that state; *Baker* v. *Carr,* 369 U. S. 186 (1962), and *Dorsey* v. *Fortson,* 228 F. Supp. 259 (N. D. Ga. 1964).

problem except as to that" (R. 196). Accordingly, the court allowed six months for desegregation of institutions subject to the control of appellant Austin and specifically excepted from its desegregation decree "in very exceptional instances" the drunk tank or bull pens about which appellant expressed some concern. As was the case with appellant Lee, appellant Austin virtually wrote his own desegregation decree. The court allowed every concession requested by appellants. The decree of the court is thus an effectuation of appellants' own judgment. Plainly, the argument that the courts have usurped the discretion of prison officials is without merit.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

CHARLES MORGAN, JR.
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

ORZELL BILLINGSLEY, JR.
1630 Fourth Ave. North
Birmingham, Alabama

LAUGHLIN MCDONALD
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010

Attorneys for Appellees